

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ANDREA RICH,		:ORDER
AS TRUSTEE FOR HOWARD		
RICH TRUST		DTA# 808977
	:	
for Revision of a Determination or for Refund	:	
of Tax on Gains Derived from Certain Real	:	
Property Transfers under Article 31-B of the	:	
Tax Law.	:	

The Division of Taxation, by its representative, William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel), has brought a motion dated April 3, 1991 pursuant to 20 NYCRR 3000.6(a)(3) requesting the Division of Tax Appeals to issue an order precluding petitioner from giving any evidence at the hearing in the above-captioned case of an item of which particulars demanded in a Bill of Particulars issued January 15, 1991 have not been delivered. Based upon the affirmation dated April 3, 1991 of Kenneth J. Schultz in support of the motion and upon all the pleadings and correspondence contained herein, the following order is rendered.

Petitioner commenced the above-captioned proceeding by petition dated December 4, 1990. The Division of Taxation ("Division") served an Answer to the petition dated January 15, 1991 and served a Demand for a Bill of Particulars dated January 15, 1991 demanding that petitioner serve the Division within 30 days after service of the Demand with information regarding certain allegations set forth in the petition. Thereafter, petitioner's time to respond to the Demand for a Bill of Particulars was extended to March 14, 1991. Petitioner served a Bill of Particulars on the Division on or about March 14, 1991.

The fourth unnumbered paragraph of the petition states:

"There may be further and additional grounds upon which petitioner may rely and petitioner reserves the right to present these grounds at or before the hearing."

In the sixth paragraph of its Demand, the Division requested that petitioner state all further and additional grounds upon which petitioner may rely at hearing. Petitioner's Bill of Particulars failed to respond to demand number six. The Division now seeks an order precluding petitioner from raising "further and additional grounds" and "precluding petitioner from 'reserv[ing] the right to present these grounds at or before the hearing'". In the alternative, the Division seeks an order directing petitioner to furnish a Bill of Particulars which fully and adequately responds to, and complies with, demand number six of the Division's Demand for a Bill of Particulars.

CONCLUSIONS OF LAW

The form of a taxpayer's petition to the Division of Tax Appeals is governed by the rules of the Tax Appeals Tribunal, which, as relevant here, provide that a petition must include:

"separately numbered paragraphs stating, in clear and concise terms, each and every error which the petitioner alleges has been made by the division [of taxation]...together with a statement of the facts upon which the petitioner relies to establish each said error" (20 NYCRR 3000.3[b][5]).

The fourth paragraph of the petition is not an allegation of error. It is nothing more than lawyer's boilerplate, purporting to reserve the right to amend the petition at anytime before or at the hearing. After the passing of certain time limits, neither party may amend a pleading as of right; however, the Tax Appeals Tribunal has adopted a liberal policy with regard to amendment of pleadings. 20 NYCRR 3000.4(c) provides:

"Leave [to amend] shall be freely given upon such terms as may be just, including the granting of continuances. The administrative law judge...may permit pleadings to be amended before the hearing is concluded to conform them to the evidence, upon such terms as may be just including the granting of continuances" (see also, Matter of Hecht v. City of Lackawanna, 44 AD2d 763, 354 NYS2d 245, lv denied 35 NY2d 643, 361 NYS2d 1027; Matter of Diamond Term. Corp., Tax Appeals Tribunal, September 28, 1988).

As the fourth paragraph of the petition is not an appropriate pleading, it is not an appropriate item for a Demand for a Bill of Particulars. At this point in the proceeding, petitioner may not amend the petition without permission of the administrative law judge (20 NYCRR 3000.4[c]). Should such a motion be made, the Division may then consider whether to oppose such a motion.

The motion for a preclusion order dated April 3, 1991 is denied.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE